



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 153 OF 2006

BETWEEN

WILLIAM C. OLOLO.....1ST PLAINTIFF/RESPONDENT

VERSUS

NATIONAL HOUSING CORPORATION.....1ST DEFENDANT/APPLICANT

INSPECTOR AGGREY OMONDI.....2ND DEFENDANT

COMMISSIONER OF POLICE.....3RD DEFENDANT

THE PERMANENT SECRETARY OFFICE OF THE PRESIDENCY.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. By a notice of motion dated 26.06.19 brought under Sections 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 17 rule 2(3) of the Civil Procedure Rules, the 1st Defendant/Applicant prays for orders that

a. The suit against the 1st Defendant/Applicant be dismissed for want of prosecution

b. Costs of this application and the entire suit be awarded to the Defendant/Applicant

2. The application is based on the grounds among others that the Plaintiff/Respondent has neglected and/or otherwise failed to set down the suit for hearing and /or failed to take any steps to prosecute the same for a period of over one year.

3. The application is supported by an affidavit sworn on 26th June, 2019 by Pamela Atieno Obok who describes herself as the Legal Assistant for 1st Defendant/Applicant in which she reiterates the grounds on the face of the application.

4. The application is opposed on the basis of an undated replying affidavit sworn by the Ted. O. Omondi advocate for the Plaintiff/Respondent and filed on 24th September, 2019 on 31.7.18. He avers the Plaintiff/Respondent and one Stephen Ayugi filed separate cases against the Defendants and that Stephen Ayugi's **HCCC NO. 154 OF 2006** was transferred to Employment and Labour Relations Court where it was renamed **ELRC NO. 367 OF 2017** and was determined by a judgment dated 21st February, 2019 annexed and marked TNO 3. He avers that there was an understanding with Mr. Mwesigwa advocate for 1st Defendant/Applicant that they await the outcome of **ELRC NO. 367 OF 2017** before this case could proceed. He further avers that he invited the Defendant's to take a date on 02.05.19 but the file could not be traced and in support thereof annexed an invitation letter dated 29.04.19. He avers that they complained about the missing file and referred to a letter dated 30.05.19 which was not annexed.

5. In his replying affidavit sworn on 20th September, 2019, the Plaintiff/Respondent reiterates the averments in the replying affidavit by his advocate Ted. O. Omondi advocate and stated that he has always been ready to proceed.

6. I have considered the notice of motion in the light of the affidavits on record and submissions by counsel. It is not disputed that this matter was last in court on 08.11.17 but counsel for the Plaintiff sought an adjournment on the ground that he did not have some crucial documents

in support of the Plaintiff's case.

7. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits and can be found in Article 159(2) (b) of the Constitution that justice shall not be delayed. Equally, Section 3A of the Civil Procedure Act gives the courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Under Section 63 (e) of the same Civil Procedure Act, which is the statutory basis for all interlocutory applications, courts are assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

8. The courts are also empowered by Sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

9. Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity.

10. The test to be applied when considering an application for dismissal of a suit for want of prosecution can be found in the case of **Ivita V Kyumba [1984] KLR 441** where the court held that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

11. In **Naftali Onyango v National Bank of Kenya [2005] eKLR**, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in **Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543**, F. Azangalala J (as he then was) stated as follows: -

“The defendant must show:

i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.

iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.”

12. It is not disputed that this case and **ELRC NO. 367 OF 2017** arose of the same incident. Mr. Ted.O.Omondi's averment that he agreed with Mr. Mwesigwa advocate for 1st Defendant/Applicant that they await the outcome of **ELRC NO. 367 OF 2017** before this case could proceed has not been controverted. **ELRC NO. 367 OF 2017** was concluded by a judgment dated 21.02.19 which is slightly more than 4 months before this application for dismissal was filed. The Respondent and his advocate have not offered an explanation why this case was not fixed for hearing immediately after 21.02.19 or not long thereafter. Consequently, I find that the Plaintiff has not offered a reasonable excuse for this inaction, to the satisfaction of the court.

13. The foregoing notwithstanding, this court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, since delay occasions injustice to either party to the dispute and delay defeats equity.

14. I am aware that continued delay no doubt infringes on the defendants' rights and legitimate expectations that disputes against them should be resolved expeditiously but there is no evidence that the prejudice suffered by the 1st Respondent cannot be compensated by an award for costs.

DISPOSITION

15. Consequently, the notice of motion dated 26.06.19 is considered and I make the following orders:

a. The prayer for dismissal of Plaintiff/Respondent's case for want of prosecution is disallowed

b. The Plaintiff/Respondent is condemned to pay thrown away costs in the sum of Kshs. 15,000/- to the 1st Defendant/Applicant within 30 days from the date hereof

c. This matter is transferred to the Chief Magistrate's Court in Kisumu for hearing and disposal

DATED AND DATED IN KISUMU THIS 21st DAY OF *November* 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Plaintiff/Respondent - Mr. Maua hb Mr. Mwamu

For 1st Defendant/Applicant - Mr. Mwesigwa